Supreme Court, U.S.
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No. 14-916

In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Department of Veterans Affairs procurements at issue in this case have been fully performed and, if so, whether the case is moot.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

The United States respectfully submits this supplemental brief in response to this Court's order of November 4, 2015. Although the three procurements at issue in this case have been fully performed, the case is not moot because the current controversy between the parties is "capable of repetition, yet evading review." *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998) (citation omitted).

So long as petitioner continues to compete to provide the Department of Veterans Affairs (VA) with emergency-notification and other information technology (IT) services, it will likely experience on a regular basis the same harm that it alleges here. The VA places thousands of orders for such services each year under Federal Supply Schedule (FSS) or similar preexisting contracts. As the government understands petitioner's business, petitioner could compete to perform at least some of those services if, rather than placing FSS orders for which petitioner is not an au-

thorized vendor, the VA were instead to solicit and award wholly new contracts on the open market.

VA orders for emergency-notification services and other ongoing IT services often (as in this case) have a base period with a fixed end date that is a year or less away. And even when the VA exercises an option to extend a procurement for such services, the total period of performance is frequently less than two years. The sequence of events that occurred in this case, in which the services that were the subject of the challenged procurements were completed well before this Court had an opportunity to rule on the merits of petitioner's claims, therefore is likely to be repeated in future cases that present the same underlying legal issue.

Although a preliminary injunction or stay can extend the window for judicial review of some contracts and orders for services, a stay cannot prevent a fixed end date from arriving. Because the procurements at issue here were for the performance of ongoing services during particular intervals of time with fixed end dates, petitioner's failure to seek a stay or similar interim relief should not preclude it from invoking the "capable of repetition, yet evading review" exception to ordinary mootness principles. And it is well-settled that, for purposes of that exception, two years is an insufficient period of time to obtain review in this Court. Accordingly, this case is not moot.

A. Each Of The VA Procurements At Issue In This Case Was Fully Performed By May 31, 2013

Petitioner challenged three VA procurements for emergency-notification services. For each procurement, the relevant services were completely performed by May 31, 2013.

1. Petitioner protested an order that the VA had placed with LiveProcess, Inc., on September 30, 2011. Decl. of Cordyon Ford Heard III (Decl.) ¶ 6; see Am. Compl. ¶¶ 27-43. The VA placed that order under LiveProcess's pre-existing FSS contract. Decl. ¶ 6. The order was to implement an emergency-notification system for the VA San Francisco Medical Center through a subscription to Live Process Enterprise, an emergency notification system sold by LiveProcess. Am. Compl. ¶¶ 28-29; see Decl. ¶ 6. The order also provided for accompanying services, including operation, maintenance, and training on the system's use. Decl. ¶ 6. The subscription and accompanying services expired, and performance was completed, by September 14, 2012. *Ibid.*

2. Petitioner challenged the VA's exercise of an option with LiveProcess to extend a similar order for a subscription to LiveProcess, with accompanying operation, maintenance, and training services, for a network of nine medical centers and associated outpatient clinics. Am. Compl. ¶¶ 44-50; see Decl. ¶ 7; see also *Kingdomware Techs.—Costs*, B-406228.2, 2012 CPD ¶ 157, at 1-2 (Comp. Gen. May 10, 2012). That subscription expired, and performance was completed, by September 30, 2012. Decl. ¶ 7.

3. Petitioner protested a VA order for emergency-notification services at four VA medical centers and associated outpatient clinics. J.A. 30; see Am. Compl. ¶¶ 51-60. That order was the subject of stipulated facts and is described in the parties' merits briefs in this Court. See J.A. 30-32; see also Pet. Br. 21-22; U.S. Br. 18-19. On February 22, 2012, the VA placed the order with Everbridge Inc., under its pre-existing FSS Blanket Purchase Agreement. J.A. 31. The

award became effective March 1, 2012, and provided for a one-year base period of performance, with two options to extend performance, each for one additional year. *Ibid.* The VA exercised the first option to extend the time to May 31, 2013, and Everbridge completed performance by that date. Decl. ¶ 8.

4. As anticipated, see J.A. 30, the VA now has an emergency-notification system intended to operate VA-wide. Decl. ¶ 10. But that system is not fully deployed, and the VA continues to procure emergency-notification systems for particular VA centers. *Ibid.* Since May 31, 2013, when performance of the procurements at issue here ended, the VA has placed 13 more orders for emergency-notification services, and it "expects to continue doing so." *Ibid.* Reflecting the critical nature of emergency-notification services, those orders usually require the implementation of a fully functional emergency-management and notification software system either immediately (if the order goes to the incumbent) or within days of the order (if a new provider must be phased in). *Ibid.* The orders further require that the vendor then operate and maintain the system, as well as provide training related to its use, "for a base period that lasts until a fixed end date, ordinarily one year or less away." *Ibid.* As in this case, the orders also "often have options to extend performance for additional years." *Ibid.* "[I]n practice, the total period of performance on such orders, including options, is typically less than two years." *Ibid.*

B. This Case Is Not Moot

"It is a basic principle of Article III that a justiciable case or controversy must remain 'extant at all stages of review, not merely at the time the complaint

is filed.'" *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (per curiam) (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997)). This case involves a challenge to three VA procurements for emergency-notification services, and performance of those services was completed by May 31, 2013. "Ordinarily, it would seem readily apparent that a challenge to an expired contract is moot, because the court could provide no relief to the allegedly aggrieved parties." *Public Utils. Comm'n* v. *FERC*, 236 F.3d 708, 714 (D.C. Cir. 2001). This case is not moot, however, because the same legal issue is likely to recur in future controversies between the same parties, under circumstances where (as here) the period of contract performance is too short to allow full judicial review before performance is complete.

1. With respect to the specific procurements that were identified in petitioner's complaint, no effective judicial relief remains available, since the relevant services have been fully performed.

a. Petitioner sued in the United States Court of Federal Claims (CFC), asserting that the VA had violated 38 U.S.C. 8127(d) in conducting the three procurements described above. Am. Compl. ¶ 2. As relief, petitioner sought a permanent injunction requiring the VA (1) to terminate the two task orders and the option; and (2) to issue a solicitation on the open market for "the remaining term of the requirement[s]," on the basis of competition restricted to small businesses owned and controlled by service-disabled veterans (SDVOSBs). Am. Compl., Prayer for Relief (Relief) ¶¶ 1(b), 2(a); see *id.* ¶ 3(a). Petitioner also sought declaratory relief. *Id.* ¶¶ 1(c) and (d), 2(b) and (c), 3(b).

Because performance of the procured emergency-notification services is now complete, a court can no longer enjoin further performance of those services. A court likewise cannot require the VA to conduct a new solicitation for any "remaining term," because no term remains. For the same reason, a declaration that these awards were unlawful and should be re-solicited would have no practical impact on the performance of the services that were the subject of the challenged procurements, since those services have been completed for the periods of time at issue.

b. Petitioner also initially sought to have the CFC broadly declare unlawful and enjoin the VA's procedures for placing orders under pre-existing contracts. *E.g.*, Relief ¶¶ 1(b)-(e). The CFC is an Article I court, 28 U.S.C. 171(a), with jurisdiction to hear suits "by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement," 28 U.S.C. 1491(b)(1).[1] Under Section 1491(b)(1), the CFC lacks "jurisdiction to grant injunctive or declaratory relief for violations of law not connected with a procurement action to which plaintiff is an interested party." CFC Doc. 18, at 2 (Aug. 21, 2002) (Mot. to Dismiss Order). The CFC has bid-protest jurisdiction only when an interested party alleges a statutory or regulatory violation in connection with a particular procurement or proposed pro-

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[1] In exercising its statutory jurisdiction, the CFC applies Article III case-or-controversy requirements. See *Weeks Marine, Inc.* v. *United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009); *Anderson* v. *United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003).

curement. See *Distributed Solutions, Inc.* v. *United States*, 539 F.3d 1340, 1344-1345 (Fed. Cir. 2008); *Service Disabled Veteran Owned Small Bus. Network, Inc.* v. *United States*, 110 Fed. Cl. 664, 667 (2013).

Based on those principles, the CFC correctly dismissed petitioner's generalized claims for relief as beyond its jurisdiction. Mot. to Dismiss Order 2. Because petitioner did not pursue those broad requests on appeal, see Pet. C.A. Br. 3; Pet. i; Pet. Br. 1-59, they are no longer part of this case. Petitioner also initially sought a money judgment for bid-protest costs, Relief ¶ 1(a), and reasonable fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412(d), Relief ¶¶ 1(g), 2(f), and 3(d). Petitioner voluntarily dismissed the claim for bid-protest costs, however, see Mot. to Dismiss Order 1, and the possibility of obtaining attorney's fees is "insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

2. For the foregoing reasons, no form of judicial relief remains available that would affect the specific procurements that were the focus of petitioner's complaint. This case is not moot, however, because it fits within the narrow exception for disputes that are "capable of repetition, yet evading review." *Spencer*, 523 U.S. at 17 (citation omitted). That exception "applies only where '(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'" *Juvenile Male*, 131 S. Ct. at 2865 (brackets in original) (quoting *Spencer*,

523 U.S. at 17). Those requirements are satisfied here.

a. The "challenged action" in this case—the VA's solicitation and award of orders to perform custom emergency-notification services—is "in its duration too short to be fully litigated prior to cessation or expiration." *Juvenile Male*, 131 S. Ct. at 2865 (quoting *Spencer*, 523 U.S. at 17). The narrow "capable of repetition, yet evading review" exception applies when "the opportunity for remedy" is of "inherently short duration," *Lewis*, 494 U.S. at 481, as with a pregnancy, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), such that full litigation (including appellate review) is impossible. See *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 547 (1976) (challenge to a protective order barring press coverage of a criminal trial would "evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived").

Challenged conduct lasting two years or less generally evades review unless interim judicial relief can preserve the opportunity for consideration. That is especially so when the challenged conduct, like the emergency-notification-services orders here, has a fixed end date. No injunction can stay the march of time. In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911) (*Southern Pacific*), for example, this Court held that it had power to review a challenge to an Interstate Commerce Commission rate order that was scheduled to remain in effect for two years, lest review of the questions involved be "defeated * * * by short term orders, capable of repetition, yet evading review." *Id.* at 515; see *id.* at 514. For this reason, courts of appeals have found that disputes concerning short-term

contracts with fixed end dates are capable of repetition, yet evading review. *E.g.*, *Alcoa, Inc.* v. *Bonneville Power Admin.*, 698 F.3d 774, 786-787 (9th Cir. 2012) (challenge to initial period of contract to sell electricity with defined end date); *Guardian Moving & Storage Co.* v. *Interstate Commerce Comm'n*, 952 F.2d 1428, 1430, 1432 (D.C. Cir. 1992) (grant of temporary authority to operate a motor carrier, where the authority had a maximum statutory duration of 270 days).

VA orders for emergency-notification services share these characteristics, and a challenge to their lawfulness would evade review if it became moot when performance was complete. As explained above, the VA continues to procure site-specific emergency-notification services. See p. 4, *supra*. Orders for these kinds of services typically require immediate implementation of a fully-functional system, coupled with operation and maintenance of that system for a base period of one year or less, with options to extend for additional years. *Ibid.* This basic structure is also commonly used for other kinds of IT-service orders as well. *Ibid.* One year is too short to allow full judicial review of a dispute concerning the procurement's legality. See *Southern Pac.*, 219 U.S. at 514-515.

To be sure, the FSS orders at issue here also included options to extend the period of time during which the relevant services would be performed. But a disappointed bidder cannot know in advance whether the VA will ultimately exercise an option to extend the period of performance. And even when the VA fully exercises the options available under the terms of such a procurement, the total period of performance is still often two years or less, as it was for each

of the orders challenged here. Decl. ¶ 10. Two years is also too short for full judicial review. *Southern Pac.*, 219 U.S. at 514-515. And because the base periods and any subsequent options established by the orders here had fixed end dates, a stay of performance would not have allowed judicial review to be completed before the procurements expired by their terms. Decl. ¶ 10. Although it is difficult to generalize for all of the different kinds of IT-related VA orders for which petitioner may be an "interested party," 28 U.S.C. 1491(b)(1), other kinds of VA orders for IT services outside the emergency-notification context are also "often structured this way, with a fixed base period of one year or less plus options to extend the period of performance." Decl. ¶ 10.

In some circumstances, interim judicial relief may prevent completion of particular challenged conduct, and thus prolong the period during which a dispute as to that conduct's legality remains live. The effectiveness of such relief in preserving a live dispute will depend in part on the nature of the service to be performed and, in particular, on the manner in which completion of that service is defined. Performance of a contract to repair a vehicle, for example, is not completed until the vehicle is fixed. A stay that delays that occurrence may prolong a live dispute as to who will perform the work. A contract to perform security services at a particular facility during calendar year 2013, by contrast, cannot be performed after that year ends. A stay or injunction might prevent the government from acquiring those services at all, but it would not prolong the existence of a live dispute as to who will perform them, since the contracted-for services by their nature cannot be performed at a later date.

Where interim judicial relief would have preserved the plaintiff's ability to perform the relevant contract if its challenge had ultimately prevailed, courts of appeals have consistently held that a challenger who failed to request such relief "may not, barring exceptional circumstances, later claim his case evaded review." *Armstrong* v. *FAA*, 515 F.3d 1294, 1297 (D.C. Cir. 2008); see 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.99[1], at 101-416 & n.16 (3d ed. 2015) (similar). But when an injunction or stay would not have prolonged the period during which the controversy remained live, courts have not required challengers to seek interim relief before invoking the "capable of repetition, yet evading review" exception to ordinary mootness principles. See pp. 8-9, *supra*. Those remedies would not have been effective here, given the facts of this case and the nature of petitioner's challenge. See 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.8, at 382-383 & n.13 (3d ed. 2008 & Supp. 2015) ("[D]isputes over the terms or awards of government contracts * * * often involve short contract periods and repeat bidders."); see also *Rocks* v. *City of Phila.*, 868 F.2d 644, 646-647 (3d Cir. 1989); *Valley Constr. Co.* v. *Marsh*, 714 F.2d 26, 28 (5th Cir. 1983). Because the orders at issue here were for the performance of ongoing services during discrete time periods with fixed end dates, an injunction against performance would not have preserved the opportunity for review, but instead would only have threatened to prevent the VA from fulfilling a critical need for those discrete periods. See Decl. ¶ 10.

b. There is also a "reasonable expectation" that petitioner—"the same complaining party"—will again

be denied contracting opportunities when the VA places orders under FSS or similar pre-existing contracts rather than soliciting new contracts for which petitioner might wish to compete. *Juvenile Male*, 131 S. Ct. at 2865 (quoting *Spencer*, 523 U.S. at 17). The VA applies Section 8127(d) each time it solicits and awards new contracts on the open market, but never when it places orders under pre-existing contracts. See U.S. Br. 20-31. When placing orders under pre-existing FSS contracts, the VA "may, at [its] discretion," limit competition for those orders to SDVOSBs that already have pre-existing contracts on the relevant FSS schedule. 15 U.S.C. 644(r)(2); see 48 C.F.R. 8.405-5(a) (2014). Petitioner could not have been awarded the FSS orders at issue here, however, because its pre-existing FSS contract did not authorize it to compete for these categories of IT services. See CFC Doc. 22, at 3 (Sept. 18, 2012).

Petitioner contends (Br. 26-27) that, before placing orders under the FSS or "turning to other sources of supply," the VA must first look at the market as a whole to assess whether there is a reasonable expectation that two or more SDVOSBs will submit offers and whether award can be made at a fair and reasonable price. Petitioner argues that, if the VA has such an expectation, the VA cannot lawfully place an order under a pre-existing contract but must instead award a wholly new contract on the open market, on the basis of competition restricted to SDVOSBs. This choice between the VA's approach and petitioner's interpretation of Section 8127(d) will have a practical impact on petitioner in every future procurement where petitioner would have competed for a wholly new contract if one had been solicited, but the VA

instead chooses to place an FSS order for services within a category as to which petitioner is not an authorized FSS vendor.

Given the nature of petitioner's business and the breadth of its position, such procurements likely will be numerous. Petitioner is an SDVOSB, J.A. 33, that has been awarded several contracts and purchase orders (*i.e.*, wholly new government contracts), as well as delivery orders under pre-existing government contracts. See Decl. ¶ 12. Since mid-2011, petitioner's contracts and delivery orders have all been for various kinds of IT services. *Ibid.* Petitioner's website asserts that petitioner "provides web, software, and technology solutions to enterprise problems," and that it "specialize[s] in providing web, client, network and mobile application solutions for government." *Id.* ¶ 11 (brackets in original). Based on the allegations in this case and statements on petitioner's website, the government's understanding is that petitioner focuses on performing emergency-notification services, similar to the services that the VA procured through the FSS orders that petitioner challenged here, but also offers a broader array of IT services. See *id.* ¶¶ 11-15. Petitioner has done business with the government as recently as September 23, 2015. *Id.* ¶ 13.

Even when looking narrowly at FSS orders for emergency-notification services at particular VA centers, the issue in this case has already recurred 13 times since May 2013, and the VA expects it will continue to recur in the future. Decl. ¶ 10; see p. 4, *supra*. Looking more broadly at other kinds of IT-service orders, the issue will likely recur even more often. Current data indicate that "from fiscal year 2012 through fiscal year 2015, the VA placed approxi-

mately 342,000 task and delivery orders under pre-existing contracts, for an average of approximately 85,500 per year." Decl. ¶ 14. "Of those total orders, approximately 160,000 were placed under FSS contracts, for an average of approximately 40,000 per year." *Ibid.* Current data further indicate that, during this same span, "the VA placed a total of approximately 15,500 orders in the nine industry sectors for which Kingdomware[ ]is a registered SDVOSB," including 3991 orders placed under the FSS. *Id.* ¶ 15. Although it is unclear how many VA orders in the future actually will be for the sorts of IT services that petitioner provides and where the same legal issue here would recur, it will clearly recur on many future occasions.

C. This Court Should Either Reschedule This Case For Argument And Affirm The Judgment Below, Or Vacate That Judgment To Allow The Court Of Appeals To Decide The Mootness Issue In The First Instance

For the reasons set forth above, this case is not moot. Accordingly, this Court should reschedule the case for oral argument, and it should affirm the judgment of the court of appeals for the reasons stated in the government's brief.

In the alternative, the Court may wish to vacate the court of appeals' judgment and to remand for further consideration in light of the briefing before this Court. If the "capable of repetition, yet evading review" exception to mootness principles does not apply in this case, then the case became moot when the last of the challenged procurements was completed (*i.e.*, by May 31, 2013), well before the court of appeals entered its judgment on June 3, 2014. Petitioner argued below that the case was not moot, on the

ground that "this continuing dispute is likely to evade review because such short contract terms do not provide sufficient time for the matter to be litigated fully." Pet. C.A. Br. 54. The government did not contest the Federal Circuit's jurisdiction, and the court of appeals did not address mootness when it decided this case on the merits. Because the mootness issue would not independently warrant this Court's review, the Court may wish to allow the court of appeals to resolve that question, and any resulting effect on its judgment, in the first instance.

Vacatur and remand for further proceedings would also permit the court of appeals, if it concludes that the case is not moot, to reconsider the merits of petitioner's challenge to the procurements at issue here in light of the briefing in this Court. As that briefing makes clear, the parties agree that Section 8127(d)'s set-aside procedures are mandatory, not discretionary, when the VA solicits and awards new contracts on the open market. Compare Pet. Br. i, with U.S. Br. 25. The dispute between the parties concerns whether Section 8127(d) applies to the VA's placement of orders under FSS and similar pre-existing contracts.

The CFC focused on that issue and deferred to the VA's conclusion that Section 8127(d) does not apply to FSS orders. See Pet. App. 66a-71a. The court of appeals, by contrast, did not rely on the distinction between FSS orders and solicitations of new contracts on the open market. That court instead appeared to conclude more generally that, so long as the VA meets its goals for participation by SDVOSBs and veteran-owned small businesses (VOSBs) in VA contracts, the set-aside procedures described in Section 8127(d) are

discretionary in both types of procurement. See *id.* at 19a-21a.

The court of appeals correctly recognized that petitioner's interpretation of Section 8127(d) would render superfluous the statutory directive that the VA establish contracting goals for VOSBs and SDVOSBs. See U.S. Br. 31-33. But, to the extent the court viewed Section 8127(d) set-asides as discretionary even when the VA solicits and awards new contracts on the open market, its analysis is not consistent with the position of the United States. If this Court chooses to vacate the judgment below and remand for initial consideration of the mootness question by the court of appeals, and if that court concludes on remand that this case is not moot, further consideration of the merits by the court of appeals might be of benefit to this Court.

* * * * *

For the foregoing reasons, this case is not moot. For the reasons set forth in the United States' merits brief, the judgment of the court of appeals should be affirmed. In the alternative, this Court may wish to vacate the judgment below and remand the case to allow the court of appeals to address the mootness issue in the first instance.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

NOVEMBER 2015